THE SLAVE IN UPPER CANADA

By W. R. Riddell

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The dictum of Lord Chief Justice Holt: "As soon as a slave enters England he becomes free"[1] was succeeded by the decision of the Court of King's Bench to the same effect in the celebrated case of Somerset *v.* Stewart[2] where Lord Mansfield is reported to have said: "The air of England has long been too pure for a slave and every man is free who breathes it."[3]

James Somerest,[4] a Negro slave of Charles Stewart in Jamaica, had been brought by his master to England "to attend and abide with him and to carry him back as soon as his business should be transacted." The Negro refused to go back, whereupon he was put in irons and taken on board the ship *Ann and Mary* lying in the Thames and bound for Jamaica. Lord Mansfield granted a writ of habeas corpus requiring Captain Knowles to produce Somerset before him with the cause of the detainer. On the motion, the cause being stated as above indicated, Lord Mansfield re-

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[1] Per Hargrave *arguendo,* Somerset *v.* Stewart (1772), Lofft 1, at p. 4; the speech in the State Trials Report was never actually delivered.

[2] (1772) Lofft 1; (1772) 20 St. Trials 1.

[3] These words are not in Lofft or in the State Trials but will be found in Campbell's *Lives of the Chief Justices,* Vol. II, p. 419, where the words are added: "Every man who comes into England is entitled to the protection of the English law, whatever oppression he may heretofore have suffered and whatever may be the colour of his skin. 'Quamvis ille niger, quamvis tu candidus esses'" and certainly Vergil's verse was never used on a nobler occasion or to nobler purpose. Verg. E. 2, 19.

William Cowper in *The Task,* written 1783–1785, imitated this in his well-known lines:

> "Slaves cannot breathe in England; if their lungs
> Receive our air, that moment they are free.
> They touch our country and their shackles fall."

[4] I use the spelling in Lofft; the State Trials and Lord Campbell have "Somersett" and "Steuart."

ferred the matter to the Full Court of King's Bench; whereupon, on June 22, 1772, judgment was given for the Negro. The basis of the decision, the theme of the argument, was that the only kind of slavery known to English law was villeinage, that the Statute of Tenures (1660) (12 Car. 11, c. 24) expressly abolished villeins regardant to a manor and by implication villeins in gross. The reasons for the decision would hardly stand fire at the present day. The investigation of Paul Vinogradoff and others have conclusively established that there was not a real difference in status between the so-called villein regardant and villein in gross, and that in any case the villein was not properly a slave but rather a serf.[5] Moreover, the Statute of Tenures deals solely with tenure and not with status.

But what seems to have been taken for granted, namely that slavery, personal slavery, had never existed in England and that the only unfree person was the villein, who, by the way was real property, is certainly not correct. Slaves were known in England as mere personal goods and chattels, bought and sold, at least as late as the middle of the twelfth century.[6] However weak the reasons given for the decision, its authority has never been questioned and it is good law. But it is good law for England, for even in the Somerset case it was admitted that a concurrence of unhappy circumstances had rendered slavery necessary[7] in the American colonies: and Parliament had recognized the right of property in slaves there.[8]

[5] See, *e. g.*, Vinogradoff, *Villeinage in England*, passim; Hallam's *Middle Ages* (ed. 1827), Vol. 3, p. 256; Pollock & Maitland, *History of English Law*, Vol. 1, pp. 395 sqq. Holdsworth's *History of English Law*, Vol. 2, pp. 33, 63, 131; Vol. 3, pp. 167, 377–393.

[6] See Pollock & Maitland's *History Eng. Law*, Vol. 1, pp. 1–13, 395, 415; Holdworth's *Hist. Eng. Law*, Vol. 2, pp. 17, 27, 30–33, 131, 160, 216.

[7] "So spake the fiend and with necessity,
The tyrant's plea, excused his devilish deeds."
Paradise Lost, Bk. 4, 11. 393, 394.

Milton a true lover of freedom well knew the peril of an argument based upon supposed necessity. Necessity is generally but another name for greed or worse.

[8] *E. g.*, the Statute of (1732) 5 Geo. II, C. 7, enacted, sec. 4, "that from

When Canada was conquered in 1760, slavery existed in that country. There were not only Panis[9] or Indian Slaves, but also Negro slaves. These were not enfranchised by the conqueror, but retained their servile status. When the united empire loyalists came to this northern land after the

and after the said 29th. September, 1732, the Houses, Lands, Negroes and other Hereditaments and real Estates situate or being within any of the said (British) Plantations (in America) shall be liable'' to be sold under execution. Note that the Negroes are ''Hereditaments and Real Estate.''

[9] The name *Pani* or *Panis,* Anglicized into *Pawnee,* was used generally in Canada as synonymous with ''Indian Slave'' because these slaves were usually taken from the Pawnee tribe. Those who would further pursue this matter will find material in the *Wisconsin Historical Collections,* Vol. XVIII, p. 103 (note); Lafontaine, *L'Esclavage in Canada* cited in the above; *Michigan Pioneer and Historical Collections,* Vol. XXVII, p. 613 (n); Vol. XXX, pp. 402, 596. Vol. XXXV, p. 548; Vol. XXXVII, p. 541. From Vol. XXX, p. 546, we learn that Dr. Anthon, father of Prof. Anthon of Classical Text-book fame, had a ''Panie Wench'' who when the family had the smallpox ''had them very severe'' along with Dr. Anthon's little girl and his ''aeltest boy'' ''whoever they got all safe over it and are not disfigured.''

Dr. Kingsford in his *History of Canada,* Vol. V, p. 30 (n), cites from the *Documents of the Montreal Historical Society,* Vol. I, p. 5, an ''ordonnance au sujet des Nègres et des sauvages appelés panis, du 15 avril 1709'' by ''Jacques Raudot, Intendant.'' ''Nous sous le bon plaisir de Sa Majesté ordonnons, que tous les Panis et Nègres qui ont été achetés et qui le seront dans la suite, appartiendront en pleine proprieté a ceux qui les ont achetés comme étant leurs esclaves.'' ''We with the consent of His Majesty enact that all the Panis and Negroes who heretofore have been or who hereafter shall be bought shall be the absolute property as their slaves of those who bought them.'' This ordinance is quoted (*Mich. Hist. Coll.,* XII, p. 511), and its language ascribed to a (nonexistent) ''wise and humane statute of Upper Canada of May 31, 1798''—a curious mistake, perhaps in copying or printing.

There does not seem to have been any distinction in status or rights or anything but race between the Panis and the other slaves. I do not know of an account of the numbers of slaves in Canada at the time; in Detroit, March 31, 1779, there were 60 male and 78 female slaves in a population of about 2,550 (*Mich. Hist. Coll.,* X, p. 326); Nov. 1, 1780, 79 male and 96 female slaves in a somewhat smaller population (*Mich. Hist. Coll.,* XIII, p. 53); in 1778, 127 in a population of 2,144 (*Mich. Hist. Coll.,* IX, p. 469); 85 in 1773, 179 in 1782 (*Mich. Hist. Coll.,* VII, p. 524); 78 male and 101 female (*Mich. Hist. Coll.,* XIII, p. 54). The Ordinance of Congress July 13, 1787, forbidding slavery ''northwest of the Ohio River'' (passed with but one dissenting voice, that of a Delegate from New York) was quite disregarded in Detroit (*Mich. Hist. Coll.,* I, 415); and indeed Detroit and the neighboring country remained British (de facto) until August, 1796, and part of Upper Canada from 1791 till that date.

acknowledgment by Britain of the independence of the revolted colonies, some of them brought their slaves with them: and the Parliament of Great Britain in 1790 passed an Act authorizing any "subject of . . . the United States of America" to bring into Canada "any negroes" free of duty having first obtained a license from the Lieutenant Governor.[10]

An immense territory formerly Canada was erected into a Government or Province of Quebec by Royal Proclamation in 1763 and the limits of the province were extended by the Quebec Act in 1774.[11] This province was divided into two provinces, Upper Canada and Lower Canada in 1791.[12] At this time the whole country was under

[10] This Act (1790) 30 Geo. III, c. 27, was intended to encourage "new settlers in His Majesty's Colonies and Plantations in America" and applied to all "subjects of the United States." It allowed an importation into any of the Bahama, Bermuda or Somers Islands, the Province of Quebec (then including all Canada), Nova Scotia and every other British territory in North America. It allowed the importation by such American subjects of "negros, household furniture, utensils of husbandry or cloathing free of duty," the "household furniture, utensils of husbandry and cloathing" not to exceed in value £50 for every white person in the family and £2 for each negro, any sale of negro or goods within a year of the importation to be void.

[11] The Royal Proclamation is dated 7th October, 1763; it will be found in Shortt & Doughty, *Documents relating to the Constitutional History of Canada* published by the *Archives of Canada*, Ottawa, 1907, pp. 119 sqq. The Proclamation fixes the western boundary of the (Province or) Government at a line drawn from the south end of Lake Nipissing to where the present international boundary crosses the River St. Lawrence.

The Quebec Act is (1774) 14 Geo. III, C. 83. It extends Quebec south to the Ohio and west to the Mississippi; Shortt & Doughty, pp. 401 sqq.

[12] The division of the Province of Quebec into two provinces, *i. e.*, Upper Canada and Lower Canada, was effected by the Royal Prerogative, Sec. 31 George III, c. 31, the celebrated Canada of Constitutional Act. The Message sent to Parliament expressing the Royal intention is to be found copied in the Ont. Arch. Reports for 1906, p. 158. After the passing of the Canada Act, an Order in Council was passed August 24, 1791 (Ont. Arch. Rep., 1906, pp. 158 et seq.), dividing the Province of Quebec into two provinces and under the provisions of sec. 48 of the act directing a royal warrant to authorize the Governor or Lieutenant-Governor of the Province of Quebec or the person administering the government there, to fix and declare such day as he shall judge most advisable for the commencement of the effect of the legislation in the new provinces not later than December 31, 1791. Lord Dorchester (Sir Guy Carleton) was appointed, September 12, 1791, Captain General and Governor-in-Chief of

the French Canadian law in civil matters. The law of England had been introduced into the old Government of the Province of Quebec by the Royal Proclamation of 1763; but the former French Canadian law had been reintroduced in 1774 by the Quebec Act in matters of property and civil rights, leaving the English criminal law in full force. The law, civil and criminal, had been modified in certain details (not of importance here) by Ordinances of the Governor and Council of Quebec.

The very first act of the first Parliament of Upper Canada reintroduced the English civil law.[13] This did not destroy slavery, nor did it ameliorate the condition of the slave. Rather the reverse, for as the English law did not, like the civil law of Rome and the systems founded on it, recognize the status of the slave at all, when it was forced by grim fact to acknowledge slavery it had no room for the slave except as a mere piece of property. Instead of giving him rights like those of the "servus," he was deprived of all rights, marital, parental, proprietary, even the right to live. In the English law and systems founded on it, the slave had no rights which the master was bound to respect.[14]

both provinces and he received a Royal warrant empowering him to fix a day for the legislation becoming effective in the new provinces (Ont. Arch. Rep., 1906, p. 168). In the absence of Dorchester, General Alured Clarke, Lieutenant Governor of the Province of Quebec, issued November 18, 1791, a proclamation fixing Monday, December 26, 1791, as the day for the commencement of the said legislation (Ont. Arch. Rep., 1906, pp. 169–171). Accordingly technically and in law, the new province was formed by Order in Council, August 24, 1791, but there was no change in administration until December 26, 1791.

[13] The first session of the First Parliament of Upper Canada was held at Newark (now Niagara-on-the-Lake) September 17 to October 15, 1792; the statute referred to is (1792) 32 Geo. III, c. 1 (U. C.).

[14] Everyone will remember the words of the Chief Justice of the Supreme Court of the United States in the celebrated Dred Scott case. In Dred Scott v. Sandford, 1856 (19 How. 354, pp. 404, 405), Chief Justice Roger B. Taney, speaking of the view taken of the Negro when the Constitution was framed, says: "They were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race and whether emancipated or not, yet remained subject to their authority and had no rights or privileges but such as those who held the power and the Government might choose to grant them" (p. 407). "They had no more than a century before been regarded as beings of an inferior order . . . and so far inferior that they had no rights

The first Lieutenant-Governor of Upper Canada was Col. John Graves Simcoe. He hated slavery and had spoken against it in the House of Commons in England. Arriving in Upper Canada in the summer of 1792, he was soon made fully aware that the horrors of slavery were not unknown in his new Province. The following is a report of a meeting of his Executive Council:

"At the Council Chamber, Navy Hall, in the County of Lincoln, Wednesday, March 21st, 1793.

"PRESENT

"His Excellency, J. G. Simcoe, Esq., Lieut.-Governor, &c., &c.,
The Hon^ble^ Wm. Osgoode, Chief Justice
The Hon^ble^ Peter Russell.

"Peter Martin (a negro in the service of Col. Butler) attended the Board for the purpose of informing them of a violent outrage committed by one Fromand, an Inhabitant of this Province, residing near Queens Town, or the West Landing, on the person of Chloe Cooley a Negro girl in his service, by binding her, and violently and forcibly transporting her across the River, and delivering her against her will to certain persons unknown; to prove the truth of his Allegation he produced Wm. Grisley (or Crisley).

"William Grisley an Inhabitant near Mississague Point in this Province says: that on Wednesday evening last he was at work at Mr. Froomans near Queens Town, who in conversation told him, he was going to sell his Negro Wench to some persons in the States, that in the Evening he saw the said Negro girl, tied with a rope, that afterwards a Boat was brought, and the said Frooman with his Brother and one *Vanevery,* forced the said Negro Girl into it, that he was desired to come into the boat, which he did, but did not assist or was otherwise concerned in carrying off the said Negro

which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise and traffic" (p. 411). "All of them had been brought here as articles of merchandise."

This repulsive subject now chiefly of historical interest is treated at large in such works as Cobb's *Law of Slavery,* Philadelphia, 1858; Hurd's *Law of Freedom and Bondage,* Boston, 1858; Von Holst's *Const. Hist. U. S.* (1750–1833), Chicago, 1877; the judgments of all the Judges in the Dred Scott case are well worth reading, especially that of Mr. Justice Curtis.

Girl, but that all the others were, and carried the Boat across the River; that the said Negro Girl was then taken and delivered to a man upon the Bank of the River by Froomand, that she screamed violently and made resistance, but was tied in the same manner as when the said William Grisley first saw her, and in that situation delivered to the man. . . . Wm. Grisley farther says that he saw a negro at a distance, he believes to be tied in the same manner, and has heard that many other People mean to do the same by their Negroes

"*Resolved.*—That it is necessary to take immediate steps to prevent the continuance of such violent breaches of the Public Peace, and for that purpose, that His Majesty's Attorney-General, be forthwith directed to prosecute the said Fromond.

"Adjourned."[15]

[15] This is copied from the *Canadian Archives Collection*, Q. 282, pt. 1, pp. 212 sqq.; taken from the official report sent to Westminster by Simcoe. There is the usual amount of uncertainty in spelling names Grisley or Crisly, Fromand, Frooman, Froomond or Fromond (in reality Vrooman).

Osgoode was an Englishman, the first Chief Justice of Upper Canada. Arriving in this Province in the summer of 1792, he left to become Chief Justice of Lower Canada in the summer of 1794. Resigning in 1801, he returned to England on a pension which he enjoyed until his death in 1824. He left no mark on our jurisprudence and never sat in any but trial courts of criminal jurisdiction. Osgoode Hall, our Ontario Palais de Justice, is called after him.

Russell came to Upper Canada also in 1792 as Receiver-General and Legislative Councillor; he was an Executive Councillor and when Simcoe left Canada in 1796, he acted as Administrator until the coming of the new Lieutenant Governor Peter Hunter in 1799. Russell was not noted for anything but his acquisitiveness but he was a faithful servant of the Crown in his own way.

Col. John Butler, born in Connecticut in 1728, became a noted leader of Indians. He took the Loyalist side, raising the celebrated Butler's Rangers; he settled at Niagara after the Revolutionary war and proved himself a useful citizen; he died in 1796. See Cruikshanks' *Butler's Rangers*, Lundy's Lane Historical Society's publication; Robertson's *Free Masonry in Canada*, Vol. 1, p. 470; Riddell's edition of *La Rochefoucauld's Travels in Canada*, 1795, published by the Ontario Archives, 1917, p. 177.

Navy Hall was in the little town which Simcoe named "Newark," which before this had been called Niagara, West Niagara, Nassau, Lenox and Butlersburg, now called Niagara or Niagara-on-the-lake. Navy Hall was the seat of government from 1792 to 1797. Queens Town is the present Queenston; Mississagua Point is at the embouchure of the Niagara River; it is still known by the same name, spelled generally however with a final "a." Nothing seems to be known of the subsequent fate of Chloe Cooley.

The Vroomans and Cryslers (or Chrystlers or Chryslers) the same family as Chrystler of Chrystler's Farm, the scene of an American defeat, November

The Attorney-General was John White[16] an accomplished English lawyer. He knew that the brutal master was well within his rights in acting as he did. He had the

11, 1813, were well-known residents. I am indebted to General E. A. Cruikshank for the following note:

"The Vrooman Farm is situated on the west bank of the Niagara, in the township of Niagara, about a mile below the village of Queenston, and includes that feature of the river bank generally known as Vrooman's Point; it was still in the possession of the Vrooman family when I last visited the place about twelve years ago. The remains of a small half-moon or redan battery on the point which had been constructed in the War of 1812, and played a considerable part in the battle of Queenston were then quite well marked. One of the Vroomans of that time was in the militia artillery, and assisted to serve the gun mounted on the battery. The possessor of the farm was then, I think, more than eighty years of age, but he was active and in possession of his memory and other faculties. He stated to me the exact number of shots which he had been informed by his father, or the Vrooman engaged in the action, had been fired from this gun, which of course, may or may not be correct. An Adam Chrysler, who was a lieutenant in the Indian Department in the Revolutionary War, and before that, a resident in the Scoharie district, of the Mohawk country, received lands either in the township of Niagara or the township of Stamford, near the village of Queenston. His grandson, John Chrysler, some twenty years ago, then being quite an old man, who is now dead, loaned me some very interesting documents which had been preserved in the family, and belonged to this Adam Chrysler. One of them, I remember, was the original instructions issued to him, and signed by Lieut.-Colonel John Butler, the deputy superintendent general, strictly enjoining him to restrain the Indians, with whom he was acting, from all acts of cruelty upon prisoners and noncombatants. Some members of his family, ladies, were residing at Niagara Falls, Ontario, ten years ago, and I presume still are there. I have no doubt that it was some member of Adam Crysler's family who took part in the abduction of the Cooley girl. The original spelling of this name was Kreisler, which is a fairly common German name in the Rhine Palatinate, from which this family came."

In the report by Col. John Butler of the Survey of the Settlement at Niagara, August 25, 1782 (*Can. Arch.*, Series B, 169, p. 1), McGregor Van-Every is named as the head of a family. He was married, without children, hired men or slaves, had 3 horses, no cows, sheep or hogs, 8 acres of "clear land" and raised 4 bushels of Indian corn and 40 of potatoes but no wheat or oats. His neighbor, Thomas McMicken, was married, had two young sons, one hired man and one male slave. He had two horses, 1 cow and 20 hogs, and raised ten bushels of Indian corn, 10 of oats and 10 of potatoes (no wheat) on his 8 acres of "clear land."

[16] John White called to the Bar in 1785 at the Inner Temple (probably); he practised for a time but unsuccessfully in Jamaica and through the influence of his brother-in-law, Samuel Shepherd and of Chief Justice Osgoode was appointed the first Attorney General of Upper Canada. He arrived in the

same right to bind, export, and sell his slave as to bind, export, and sell his cow. Chloe Cooley had no rights which Vrooman was bound to respect: and it was no more a breach of the peace than if he had been dealing with his heifer. Nothing came of the direction to prosecute and nothing could be done.

It is probable that it was this circumstance which brought about legislation. At the Second Session of the First Parliament which met at Newark, May 31, 1793, a bill was introduced and unanimously passed the House of Assembly. The trifling amendments introduced by the Legislative Council were speedily concurred in, the royal assent was given July 9, 1793, and the bill became law.[17]

Province in the summer of 1792 and was elected a member of the first House of Assembly for Leeds and Frontenac. He was an active and useful member. It is probable, but the existing records do not make it certain, that it was he who introduced and had charge in the House of Assembly of the Bill for the abolition of salvery passed in 1793, shortly to be mentioned. In January, 1800, he was killed in a duel at York, later Toronto, by Major John Small, Clerk of the Executive Council. His will, drawn by himself after his fatal wound, is still extant in the Court of Probate records at Toronto. One clause reads: "I desire to be rolled up in a sheet and not buried fantastically, and that I may be buried at the back of my own house." Buried in his garden at his direction, his bones were accidentally uncovered in 1871 and reverently buried in Toronto. His manuscript diary is still extant, a copy being in the possession of the writer.

[17] The statute is (1793) 33 Geo. III, c. 7, (U. C.). The Parliament of Upper Canada had two Houses, the Legislative Council, an Upper House, appointed by the Crown and the Legislative Assembly, a Lower House or House of Commons, as it was sometimes called, elected by the people. The Lieutenant Governor gave the royal assent. The bill was introduced in the Lower House, probably by Attorney General White, as stated in last note, and read the first time, June 19. It went to the committee of the whole June 25, and was the same day reported out. On June 26 it was read the third time, passed and sent up for concurrence. The Legislative Council read it the same day for the first time, went into Committee over it the next day, June 28, and July 1, when it was reported out with amendments, passed and sent down to the Commons July 2. That House promptly concurred and sent the bill back the same day. See the official reports; *Ont. Arch. Reports* for 1910 (Toronto, 1911), pp. 25, 26, 27, 28, 32, 33, *Ont. Arch. Rep.* for 1909 (Toronto, 1911), pp. 33, 35, 36, 38, 41, 42.

The first Fugitive Slave Law was passed by the United States in 1793. Three years afterwards occurred an episode, little known and less commented upon, showing very clearly the views of George Washington on the subject of fugitive slaves, at least, of those slaves who were his own.

It recited that it was unjust that a people who enjoy freedom by law should encourage the introduction of slaves, and that it was highly expedient to abolish slavery in the

A slave girl of his escaped and made her way to Portsmouth, N. H. Washington, on discovering her place of refuge, wrote concerning her to Joseph Whipple, the Collector at Portsmouth, November 28, 1796. The letter is still extant. It is of three full pages and was sold in London in 1877 for ten guineas (*Magazine of American History,* Vol. 1, December, 1877, p. 759). Charles Sumner had it in his hands when he made the speech reported in Charles Sumner's *Works,* Vol. III, p. 177. Washington in the letter described the fugitive and particularly expressed the desire of "her mistress," Mrs. Washington, for her return to Alexandria. He feared public opinion in New Hampshire, for he added

"I do not mean however, by this request that such violent measures should be used as would excite a mob or riot which might be the case if she has adherents; or even uneasy sensations in the minds of well-disposed citizens. Rather than either of these should happen, I would forgo her services altogether and the example also which is of infinite more importance."

In other words, "if the slave girl has no friends or 'adherents' " send her back to slavery—if she has and they would actively oppose her return, let her go—and even if it only be that "well-disposed citizens" disapprove of her capture and return, let her remain free.

There may be some difficulty in justifying Washington's course by the opinion of Thomas Aquinas (*Summa Theologics,* 1 ma., 2 dae., Quaest. XCVI, Art. 4), who says that an unjust law is not binding in conscience "*nisi forte propter vitandum scandalum vel turbationem.*" Aquinas is speaking of an unjust law which may be resisted unless scandal or tumult would result from resistance. Washington is speaking of a law which he considers right, but which he would not enforce if it should occasion such evils. The analogy does not hold as the editor of Charles Sumner's *Works* seems to think (Vol. III, p. 178, note).

Whipple answered from Portsmouth, December 22, 1796:

"I will now, Sir, agreeably to your desire, send her to Alexandria if it be practicable without the consequences which you except—that of exciting a riot or a mob or creating uneasy sensations in the minds of well disposed persons. The first cannot be calculated beforehand; it will be governed by the popular opinion of the moment or the circumstances that may arise in the transaction. The latter may be sought into and judged of by conversing with such persons without discovering the occasion. So far as I have had opportunity, I perceive that different sentiments are entertained on the subject."

Whipple made enquiry. Public opinion in Portsmouth was adverse to the return of the fugitive. She was unmolested and lived out a long life in Portsmouth and Kittery.

Nothing more clearly and impressively shows the veneration felt by his countrymen for George Washington than the praise the fearless, outspoken, uncompromising hater of slavery, Charles Sumner, of the conduct of the President in this transaction. Sumner considered the poor slave girl "a monument

Province so far as it could be done gradually without violating private property; and proceeded to repeal the Imperial Statute of 1790 so far as it related to Upper Canada, and to enact that from and after the passing of the Act, "No Negro or other person who shall come or be brought into this Province . . . shall be subject to the condition of a slave or to" bounden involuntary service for life. With that regard for property characteristic of the English-speaking peoples, the act contained an important proviso which continued the slavery of every "negroe or other person subjected to such service" who has been lawfully brought into the Province. It then enacted that every child born after the passing of the act, of a Negro mother or other woman subjected to such service should become absolutely free on attaining the age of twenty-five, the master in the meantime to provide "proper nourishment and

of the just forbearance of him whom we aptly call Father of his Country. . . . While a slaveholder and seeking the return of a fugitive, he has left in permanent record a rule of conduct which if adopted by his country will make slave hunting impossible." With almost any other man, Sumner would have no praise or reverence for a desire to force a fugitive back into slavery unless prevented by fear of mob or riot or adverse public opinion.

In the same letter Washington gives what may be considered a reason or excuse for his demand. "However well disposed I might be to a gradual abolition, or even to an entire emancipation of that description of people, if the latter was itself practicable at this moment, it would neither be expedient nor just to reward unfaithfulness with a premature preference and thereby discontent beforehand the minds of all her fellow servants who by their steady attachment are far more deserving than herself of favour."

This is the familiar pretext of the master, private or state. Those who rebel against oppression and wrong are not to be given any relief—that would be unjust to those who tamely submit. That very argument was advanced by the ruler across the sea against the proposition to come to terms with Washington and his party who had ventured to oppose the would-be master.

And it is to be noted that Washington did not free those "who by their steady attachment are far more deserving . . . of favour" till he had had all the advantage he could from their services—he did indeed free them by his will, but only after the death of his wife.

Sumner cannot be said to minimize his merits when he says "He was at the time a slaveholder—often expressing himself with various degrees of force against slavery, and promising his suffrage for its abolition, he did not see this wrong as he saw it at the close of life." (Sumner's *Works*, Vol. III, pp. 759 sq.)

cloathing'' for the child, but to be entitled to put him to work, all issue of such children to be free whenever born. It further declared any voluntary contract of service or indenture should not be binding longer than nine years. Upper Canada was the first British possession to provide for the abolition of slavery.[18]

It will be seen that the Statute did not put an end to slavery at once. Those who were lawfully slaves remained slaves for life unless manumitted and the statute rather discouraged manumission, as it provided that the master on liberating a slave must give good and sufficient security that the freed man would not become a public charge. But, defective as it was, it was not long without attack. In 1798, Simcoe had left the province never to return,[19] and while

[18] Vermont excluded slavery by her Bill of Rights (1777), Pennsylvania and Massachusetts passed legislation somewhat similar to that of Upper Canada in 1780; Connecticut and Rhode Island in 1784, New Hampshire by her Constitution in 1792, Vermont in the same way in 1793: New York began in 1799 and completed the work in 1827, New Jersey 1829; Indiana, Illinois, Michigan, Wisconsin and Iowa were organized as a Territory in 1787 and slavery forbidden by the Ordinance, July 13, 1787, but it was in fact known in part of the Territory for a score of years. A few slaves were held in Michigan by tolerance until far into the nineteenth century notwithstanding the prohibition of the fundamental law (*Mich. Hist. Coll.*, VII, p. 524). Maine as such never had slavery having separated from Massachusetts in 1820 after the Act of 1780, although it would seem that as late as 1833 the Supreme Court of Massachusetts left it open when slavery was abolished in that State (Commonwealth *v.* Aves, 18 Pick. 193, 209). (See Cobb's *Slavery*, pp. clxxi, clxxii, 209; Sir Harry H. Johnston's *The Negro in the New World*, an exceedingly valuable and interesting work but not wholly reliable in minutiæ, pp. 355 et seq.)

[19] Simcoe was almost certainly the prime mover in the legislation of 1793. When giving the royal assent to the bill he said: ''The Act for the gradual abolition of Slavery in this Colony, which it has been thought expedient to frame, in no respect meets from me a more cheerful concurrence than in that provision which repeals the power heretofore held by the Executive Branch of the Constitution and precludes it from giving sanction to the importation of slaves, and I cannot but anticipate with singular pleasure that such persons as may be in that unhappy condition which sound policy and humanity unite to condemn, added to their own protection from all undue severity by the law of the land may henceforth look forward with certainty to the emancipation of their offspring.'' (See *Ont. Arch. Rep.* for 1909, pp. 42–43.) I do not understand the allusion to ''protection from undue severity by the Law of the land.'' There had been no change in the law, and undue severity to slaves was prevented only by public opinion. It is practically certain that no such bill as

the government was being administered by the time-serving Peter Russell, a bill was introduced into the Lower House to enable persons "migrating into the province to bring their negro slaves with them." The bill was contested at every stage but finally passed on a vote of eight to four. In the Legislative Council it received the three months' hoist and was never heard of again.[20] The argument in favor of

that of 1798 would have been promoted with Simcoe at the head of the government as his sentiments were too well known.

[20] *Ont. Arch. Rep.* for 1909, pp. 64, 69, 70, 71, 74; *ibid.* for 1910, pp. 67, 68, 69, 70.

The bill was introduced in the Lower House by Christopher Robinson, member for Addington and Ontario, Ontario being then comprised of the St. Lawrence and Lake Ontario Islands, and having nothing in common with the present County of Ontario. He was a Virginian loyalist, who in 1784 emigrated to New Brunswick, and in 1788 to that part of Canada later Lower Canada and in 1792 to Upper Canada. He lived in Kingston till 1798 and then came to York, later Toronto, but died three weeks afterwards. He was one of the lawyers who took part in the inauguration of the Law Society of Upper Canada at Wilson's Tavern, Newark, in July, 1797, and was an active and successful practitioner. His ability was great, but his fame is swallowed up by that of his more famous son, Sir John Beverley Robinson, the first Canadian Chief Justice of Upper Canada, and of his grandson, the much loved and much admired Christopher Robinson, Q.C., of our own time. Accustomed from infancy to slavery, he saw no great harm in it—no doubt he saw it in its best form.

The chief opponent of the bill was Robert Isaac Dey Gray, the young solicitor general. John White was not in this the second house. The son of Major James Gray, a half-pay British Officer, he studied law in Canada. He was elected member of the House of Assembly for Stormont in the election of 1796 and again in 1804. He was appointed the first Solicitor General in 1797 and was drowned in 1804 in the *Speedy* disaster. An Indian, Ogetonicut, accused of a murder in the Newcastle District, was captured on the York Peninsula, now Toronto or Hiawatha Island, in the Home District, and had to be sent to Newcastle, now Presqu' Isle Point near Brighton, in the Newcastle District, for trial. The Government Schooner *Speedy* sailed for Newcastle with the Assize Judge Gray; Macdonell, who was to defend the Indian; the Indian prisoner, Indian interpreters, witnesses, the High Constable of York and certain inhabitants of York. It was lost, captain, crew and passengers—*spurlos versenkt.*

The motion for the three months' hoist in the Upper House was made by the Honorable Richard Cartwright seconded by the Honorable Robert Hamilton. These men, who had been partners, generally agreed on public measures and both incurred the enmity of Simcoe. He called Hamilton a Republican, then a term of reproach distinctly worse than Pro-German would be now, and

the bill was based on the scarcity of labor which all contemporary writers speak of, the inducement to intending settlers to come to Upper Canada where they would have the same privileges in respect of slavery as in New York and elsewhere; in other words the inevitable appeals to greed.

After this bill became law, slavery gradually disappeared. Public opinion favored manumission and while there were not many manumissions *inter vivos*,[21] in some measure owing to the provisions of the act requiring security to be given in such case against the freed man becoming a public charge, there were not a few liberations by will.[22]

Cartwright was, if anything, worse. But both were men of considerable public spirit and personal integrity. For Cartwright see *The Life and Letters of Hon Richard Cartright*, Toronto, 1876. For Hamilton see Riddell's edition of La Rochefoucault's *Travels in Canada in 1795*, Toronto, 1817, in *Ont. Arch. Rep.* for 1916; Miss Carnochan's *Queenstown in Early Years, Niagara Hist. Soc. Pub.*, No. 25; *Buffalo Hist. Soc. Pub.*, Vol. 6, pp. 73–95.

There was apparently no division in the Upper House although there were five other Councillors in addition to Cartwright and Hamilton in attendance that session viz.: McGill, Shaw, Duncan, Baby and Grant; and the bill passed committee of the whole.

[21] Slaves were valuable even in those days. A sale is recorded in Detroit of a "certain Negro man Pompey by name" for £45 New York Currency ($112.50) in October, 1794; and the purchaser sold him again January, 1795, for £50 New York Currency ($125.00). (*Mich. Hist. Coll.*, XIV, p. 417.) But it would seem that from 1770 to 1780 the price ranged to $300 for a man and $250 for a woman (*Mich. Hist. Coll.*, XIV, p. 659). The number of slaves in Detroit is said to have been 85 in 1773 and 179 in 1782 (*Mich. Hist. Coll.*, VII, p. 524).

The best people in the province continued to hold slaves. On February 19, 1806, the Honourable Peter Russell, who had been administrator of the government, and therefore head of the State for three years, advertised for sale at York "A Black woman named Peggy, aged 40 years, and a Black Boy, her son, named Jupiter, aged about 15 years," both "his property," "each being servants for life"—the woman for $150 and the boy for $200, 25 per cent off for cash. William Jarvis, the secretary, two years later, March 1, 1811, had two of his slaves brought into court for stealing gold and silver out of his desk. The boy "Henry commonly called prince" was committed for trial and the girl ordered back to her master. Other instances will be found in Dr. Scadding's very interesting work, *Toronto of Old*, Toronto, 1873, at pp. 292 sqq.

[22] A number of interesting wills are in the Court of Probate files at Osgoode Hall, Toronto. One of them only I shall mention, viz.: that of Robert I. D. Gray, the first solicitor general of the province, whose tragic death is

The number of slaves in Upper Canada was also diminished by what seems at first sight paradoxical, that is, their flight across the Detroit River into American territory. So long as Detroit and its vicinity were British in fact and even for some years later, Section 6 of the Ordinance of 1787 "that there shall be neither slavery not involuntary servitude in the said territory otherwise than as the punishment of crime" was in great measure a dead letter: but when Michigan was incorporated as a territory in 1805, the ordinance became effective. Many slaves made their way from Canada to Detroit, a real land of the free; so many, indeed, that we find that a company of Negro militia was formed in Detroit in 1806 to assist in the general defence of the territory, composed entirely of escaped slaves from Canada.[23]

Almost from the passing of the Canada Act, however, runaway Negroes began to come to Upper Canada, fleeing from slavery; this influx increased and never ceased until the American Civil War gave its death blow to slavery in the United States. Hundreds of blacks thus obtained their freedom, some having been brought by their masters near to the international boundary and then clandestinely or by force effecting a passage; some coming from far to the South, guided by the North Star; many assisted by friends

related above. In this will, dated August 27, 1803, a little more than a year before his death, he releases and manumits "Dorinda my black woman servant . . . and all her children from the State of Slavery," in consequence of her long and faithful services to his family. He directs a fund to be formed of £1,200 or $4,800 the interest to be paid to "the said Dorinda her heirs and Assigns for ever." To John Davis, Dorinda's son, he gave 200 acres of land, Lot 17 in the Second Concession of the Township of Whitby and also £50 or $200. John, after the death of his master whose body servant and valet he was, entered the employ of Mr., afterwards Chief, Justice Powell; but he had the evil habit of drinking too much and when he was drunk he would enlist in the Army. Powell got tired of begging him off and after a final warning left him with the regiment in which he had once more enlisted. Davis is said to have been in the battle of Waterloo. He certainly crossed the ocean and returned later on to Canada. He survived till 1871, living at Cornwall, Ontario, a well-known character. With him died the last of all those who had been slaves in the old Province of Quebec or the Province of Upper Canada.

[23] *Mich. Hist. Coll.*, XIV, p. 659.

more or less secretly. The Underground Railroad was kept constantly running.[24] These refugees joined settlements with other people of color freeborn or freed in the western part of the Peninsula, in the counties of Essex and Kent and elsewhere.[25] Some of them settled in other parts of the province, either together or more usually sporadically.

At the time of the outbreak of the Civil War there were many thousands of black refugees in the province.[26] More than half of these were manumitted slaves who in consequence of unjust laws had been forced to leave their State. While some of such freedmen went to the Northern States, most came to Canada, some returning to the Northern States. The Negro refugees were superior to most of their race, for none but those with more than ordinary qualities could reach Canada.[27]

The masters of runaway slaves did not always remain quiet when their slave reached this province. Sometimes they followed him in an attempt to take him back. There are said to have been a few instances of actual kidnapping,

[24] A fairly good account of the Underground Railroad will be found in William Still's *Underground Railroad*, Philadelphia, 1872, in W. M. Mitchell's *Underground Railway*, London, 1860; in W. H. Siebert's *Underground Railway*, New York, 1899; and in a number of other works on Slavery. Considerable space is given the subject in most works on slavery.

One branch of it ran from a point on the Ohio River, through Ohio and Michigan to Detroit; but there were many divagations, many termini, many stations: Oberlin was one of these. See Dr. A. M. Ross' *Memoirs of a Reformer*, Toronto, 1893, and *Mich. Hist. Coll.*, XVII, p. 248.

[25] The Buxton Mission in the County of Kent is well known. The Wilberforce Colony in the County of Middlesex was founded by free Negroes; but they had in mind to furnish homes for future refugees. See Mr. Fred Landon's account of this settlement in the recent (1918) *Transactions of the London and Middlesex Hist. Soc.*, pp. 30–44. For an earlier account see A. Steward's *Twenty Years a Slave*, Rochester, N. Y., 1857.

[26] Ross in his *Memoirs* gives, on page 111, 40,000, but he may be speaking for all Canada. The number is rather high for Upper Canada alone.

[27] "The Kingdom of heaven suffereth violence and the violent take it by force." There can be no doubt that the Southern Negro looked upon Canada as a paradise. I have heard a colored clergyman of high standing say that of his own personal knowledge, dying slaves in the South not infrequently expressed a hope to meet their friends in Canada.

a few of attempted kidnapping.[28] There have been cases in which criminal charges have been laid against escaped slaves, and their extradition sought, ostensibly to answer the criminal charges. It has always been the theory in this province that the governor has the power independently of statute or treaty to deliver up alien refugees charged with crime.[29] To make it clear, the Parliament of Upper Canada in 1833 passed an Act for the apprehension of fugitive offenders from foreign countries, and delivering them up to justice.[30] This provides that on the requisition of the executive of any foreign country the governor of the province on the advice of his executive council may deliver up any person in the province charged with "Murder, Forgery, Larceny or other crime which if committed within the Province would have been punishable with death, cor-

[28] These being merely traditional and not supported by contemporary documents are more or less mythical and I do not attempt to collect the various and varying stories.

There are several stories more or less well authenticated of masters bringing slaves into Canada with the intention of taking them back again as Charles Stewart intended with his slave James Somerset and the slaves successfully asserting their freedom, resisting removal with the assistance of Canadians. Of one of the most shocking cases of wrong, if not quite kidnapping, a citizen of Toronto was the subject. John Mink, a respectable man with some Negro blood, had a livery stable on King Street, Toronto. He was also the proprietor of stage-coach lines and a man of considerable wealth. He had an only daughter of great personal beauty, and showing little trace of Negro origin. It was understood that she would marry no one but a white man, and that the father was willing to give her a handsome dowry on such a marriage. A person of pure Caucasian stock from the Southern States came to Toronto, wooed and won her. They were married and the husband took his bride to his home in the South. Not long afterwards the father was horrified to learn that the plausible scoundrel had sold his wife as a slave. He at once went South and after great exertion and much expense, he succeeded in bringing back to his house the unhappy woman, the victim of brutal treachery.

There have been told other stories of the same kind, equally harrowing, and unfortunately not ending so well, but I have not been able to verify them. The one mentioned here I owe to the late Sir Charles Moss, Chief Justice of Ontario.

[29] The same rule obtained in Lower Canada; (1827) re Joseph Fisher, 1 Stuart's L. C. Rep. 245.

[30] This is the Act (1833), 3 Will IV, c. 7 (U. C.). This came forward as cap. 96 in the Consolidated Statutes of Upper Canada 1859, but was repealed by an Act of (United) Canada (1860), 23 Vic., c. 91 (Can.).

poral punishment, the Pillory, whipping or confinement at hard labour.'' The person charged might be arrested and detained for inquiry. The Act was permissive only and the delivery up was at the discretion of the governor.

When this act was in force Solomon Mosely or Moseby, a Negro slave, came to the Province across the Niagara River from Buffalo which he had reached after many days' travel from Louisville, Kentucky. His master followed him and charged him with the larceny of a horse which the slave took to assist him in his flight. That he had taken the horse there was no doubt, and as little that after days of hard riding he had sold it. The Negro was arrested and placed in Niagara jail; a *prima facie* case was made out and an order sent for his extradition.

The people of color of the Niagara region made Mosely's case their own and determined to prevent his delivery up to the American authorities to be taken to the land of the free and the home of the brave, knowing that there for him to be brave meant torture and death, and that death alone could set him free. Under the leadership of Herbert Holmes, a yellow man,[31] a teacher and preacher, they lay around the jail night and day to the number of from two to four hundred to prevent the prisoner's delivery up. At length the deputy sheriff with a military guard brought out the unfortunate man shackled in a wagon from the jail yard, to go to the ferry across the Niagara River. Holmes and a man of color named Green grabbed the lines. Deputy Sheriff McLeod from his horse gave the order to fire and charge. One soldier shot Holmes dead and another bayoneted Green, so that he died almost at once. Mosely, who was very athletic, leaped from the wagon and made his escape. He went to Montreal and afterwards to England, finally returning to Niagara, where he was joined by his wife, who also escaped from slavery.

An inquest was held on the bodies of Holmes and Green.

[31] To his people he seems to have been known as Hubbard Holmes; he is always called a yellow man, whether mulatto, quadroon, octoroon or other does not appear.

The jury found "justifiable homicide" in the case of Holmes; "whether justifiable or unjustifiable there was not sufficient evidence before the jury to decide" in the case of Green. The verdict in the case of Holmes was the only possible verdict on the admitted facts. Holmes was forcibly resisting an officer of the law in executing a legal order of the proper authority. In the case of Green the doubt arose from the uncertainty whether he was bayoneted while resisting the officers or after Mosely had made his escape. The evidence was conflicting and the fact has never been made quite clear. No proceedings were taken against the deputy sheriff; but a score or more of the people of color were arrested and placed in prison for a time. The troublous times of the Mackenzie Rebellion came on, the men of color were released, many of them joining a Negro militia company which took part in protecting the border.

The affair attracted much attention in the province and opinions differed. While there were exceptions on both sides, it may fairly be said that the conservative and government element reprobated the conduct of the blacks in the strongest terms, being as little fond of mob law as of slavery, and that the radicals, including the followers of Mackenzie, looked upon Holmes and Green as martyrs in the cause of liberty. That Holmes and Green and their fellows violated the law there is no doubt, but so did Oliver Cromwell, George Washington and John Brown. Every one must decide for himself whether the occasion justified in the courts of Heaven an act which must needs be condemned in the courts of earth.[32]

[32] The contemporary accounts of this transaction, *e. g.*, in the *Christian Guardian* of Toronto, and the *Niagara Chronicle*, are not wholly consistent. The main facts, however, are clear. Although there was some doubt as to the time, the military guard were ordered to fire. Miss Janet Carnochan has given a good account of this in *Slave Rescue in Niagara, Sixty Years Ago, Niag. Hist. Soc.*, Pub. No. 2. It is said that "the Judge said he must go back," the fact being that the direction was by the executive and not the courts. The *Reminiscences* of Mrs. J. G. Currie, born at Niagara in 1829 and living there at the time of the trouble, are printed in the *Niagara Hist. Soc.*, Pub. No. 20. Mrs. Currie gives a brief account (p. 331) and says that one of the party, one MacIntyre, had a bullet or bayonet wound in his cheek. In Miss Carnochan's

In 1842 the well-known Ashburton Treaty was concluded[33] between Britain and the United States. This by Article X provides that "the United States and Her Britannic Majesty shall, upon mutual requisitions . . . deliver

account, her informant, who was the daughter of a slave who had escaped in 1802 and was herself born in Niagara in 1824, says that "the sheriff went up and down slashing with his sword and keeping the people back. Many of our people had sword cuts in their necks. They were armed with all kinds of weapons, pitchforks, flails, sticks, stones. One woman had a large stone in a stocking and many had their aprons full of stones and threw them too." Mrs. Anna Jameson, in her *Sketches in Canada*, ed. of 1852, London, on pp. 55–58, gives another account. She rightly makes the extradition order the governor's act, but errs in saying that "the law was too expressly and distinctly laid down and his duty as Governor was clear and imperative to give up the felon" as "by an international compact between the United States and our province, all felons are mutually surrendered." There was nothing in the common law, or in the statute of 1833 which made it the duty of the governor to order extradition, and there was no binding compact between the United States and Upper Canada such as Mrs. Jameson speaks of. No doubt the reason given by her for the order was that in vogue among the official set with whom she associated, her husband being vice-chancellor and head (treasurer) of the Law Society. The *Christian Guardian*, *Niagara Reporter* and *Niagara Chronicle* and *St. Catharines Journal* of September, October and November, 1837, contain accounts of and comments upon the occurrences, and sometimes attacks upon each other.

Deputy Sheriff Alexander McLeod was a man of some note if not notoriety. During the rebellion of 1837 and 1838 he was in the Militia of Upper Canada. He took a creditable part in the defence of Toronto against the followers of Mackenzie in December, 1837, and was afterwards stationed on the Niagara frontier. There he claimed to have taken part in the cutting out of the Steamer *Caroline* in which exploit a Buffalo citizen, Amos Durfee, was killed. McLeod, visiting Lewiston in New York State, in November, 1840, was arrested on the charge of murder and committed for trial. This arrest was the cause of a great deal of communication and discussion between the governments of the United States and of Great Britain, the latter claiming that what had been done by the Canadian militia was a proper public act and they demanded the surrender of McLeod. This was refused. McLeod was tried for murder at Utica, October, 1841, and acquitted, it being conclusively proved that he was not in the expedition at all.

[33] Concluded at Washington, August 9, 1842, ratification exchanged at London, October 13, 1842, proclaimed November 10, 1842; this treaty put an end to many troublesome questions, amongst them the Maine boundary which it was found impracticable to settle by Joint Commissions or by reference to a European crowned head, William, King of the Netherlands. It will be found in all the collections of treaties of Great Britain or the United States, and in most of the treaties on extradition, amongst them the useful work by John G. Hawley, Chicago, 1893 (see pp. 119 sqq.).

up to justice all persons . . . charged with murder or assault with intent to commit murder, or piracy or arson or robbery or forgery or the utterance of forged paper. . . . Power was given to judges and other magistrates to issue warrants of arrest, to hear evidence and if "the evidence be deemed sufficient . . . it shall be the duty of the . . . judge or magistrate to certify the same to the proper executive authority that a warrant may issue for the surrender of such fugitive."

It will be seen that this treaty made two important changes so far as the United States was concerned: (1) It made it the duty of the executive to order extradition in a proper case and took away the discretion, (2) it gave the courts jurisdiction to determine whether a case was made out for extradition.[34] These changes made it more difficult in many instances for a refugee to escape: but as ever the courts were astute in finding reasons against the return of slaves.

The case of John Anderson is well known. He was born a slave in Missouri. As his master was Moses Burton, he was known as Jack Burton. He married a slave woman in Howard County, the property of one Brown. In 1853 Burton sold him to one McDonald living some thirty miles away and his new master took him to his plantation. In September, 1853, he was seen near the farm of Brown, when apparently he was visiting his wife. A neighbor, Seneca T. P. Diggs, became suspicious of him and questioned him. As his answers were not satisfactory he ordered his four Negro slaves to seize him, according to the law in the State of Missouri. The Negro fled, pursued by Diggs and his

[34] It was held in this province that the Act of 1833 was superseded by the Ashburton Treaty in respect to the United States, but that it remained in force with respect to other countries (Reg. *v.* Tubber, 1854, 1, P.R., 98). Since the treaty, our government has refused to extradite where the offense charged is not included in the treaty. In re Laverne Beebe (1863), 3, P. R., 273—a case of burglary.

The provisions of the treaty were brought into full effect in Canada (Upper and Lower) by the Canadian Statute of 1849, 12, Vic., c. 19, C. S. C. (1859), c. 89.

slaves. In his attempt to escape the fugitive stabbed Diggs in the breast and Diggs died in a few hours. Effecting his escape to this province, he was in 1860 apprehended in Brant County, where he had been living under the name of John Anderson, and three local justices of the peace committed him under the Ashburton Treaty. A writ of habeas corpus was granted by the Court of Queen's Bench at Toronto, under which the prisoner was brought before the Court of Michaelmas Term of 1860.

The motion was heard by the Full Court.[35] Much of the argument was on the facts and on the law apart from the form of the papers, but that was hopeless from the beginning. The law and the facts were too clear, although Mr. Justice McLean thought the evidence defective. The case turned on the form of the information and warrant, a somewhat technical and refined point. The Chief Justice, Sir John Beverley Robinson, and Mr. Justice Burns agreed that the warrant was not strictly correct, but that it could be amended: Mr. Justice McLean thought it could not and should not be amended.

The case attracted great attention throughout the province, especially among the Negro population. On the day on which judgment was to be delivered, a large number of people of color with some whites assembled in front of Osgoode Hall.[36] While the adverse decision was announced, there were some mutterings of violence but counsel for the prisoner[37] addressed them seriously and impressively, reminding them "It is the law and we must obey it." The

[35] Chief Justice Sir John Beverley Robinson, Mr. Justice McLean (afterwards Chief Justice of Upper Canada) and Mr. Justice Burns.

[36] The seat of the Superior Courts in Toronto, the Palais de Justice of the Province.

[37] Mr. Samuel B. Freeman, Q.C., of Hamilton, a man of much natural eloquence, considerable knowledge of law and more of human nature; he was always ready and willing to take up the cause of one unjustly accused and was singularly successful in his defences.

I have heard it said that it was Mr. M. C. Cameron, Q.C., who so addressed the gathering, but he does not seem to have been concerned in the case in the Queen's Bench.

melancholy gathering melted away one by one in sadness and despair. Anderson was recommitted to the Brantford jail.[38] The case came to the knowledge of many in England. It was taken up by the British and Foreign Anti-Slavery Society and many persons of more or less note. An application was made to the Court of Queen's Bench of England for a writ of habeas corpus, notwithstanding the Upper Canadian decision, and while Anderson was in the jail at Toronto, the court after anxious deliberation granted the writ,[39] but it became unnecessary, owing to further proceedings in Upper Canada.

In those days the decision of any court or of any judge in habeas corpus proceedings was not final. An applicant might go from judge to judge, court to court[40] and the last applied to might grant the relief refused by all those previously applied to. A writ of habeas corpus was taken out from the other Common Law Court in Upper Canada, the Court of Common Pleas. This was argued in Hilary Term, 1861, and the court unanimously decided that the warrant of commitment was bad and that the court could not remand the prisoner to have it amended.[41] The prisoner was dis-

[38] The case is reported in (1860), 20 Up. Can., Q. B., pp. 124–193. The warrant is given at pp. 192, 193.

[39] The case is reported in (1861), 3, Ellis & Ellis Reports, Queen's Bench, p. 487; 30, *Law Jour.*, Q. B., p. 129; 7, *Jurist*, N. S., p. 122; 3, *Law Times*, N. S., p. 622; 9, *Weekly Rep.*, p. 255.

It was owing to this decision that the statute was passed at Westminster (1862) 25, 26, Vic., c. 20, which by sec. 1 forbids the courts in England to issue a writ of habeas corpus into any British possession which has a court with the power to issue such writ. The court was Lord Chief Justice Cockburn, and Justices Crompton, Hill and Blackburn, a very strong court. The Counsel for Anderson was the celebrated but ill-fated Edwin James. The writ was specially directed to the sheriff at Toronto, the sheriff at Brantford and the jail-keeper at Brantford. Judgment was given January 15, 1861.

[40] Common law, of course, not chancery.

[41] The court was composed of Chief Justice William Henry Draper, C.B., Mr. Justice Richards, afterwards Chief Justice successively of the Court of Common Pleas, of the Court of Queen's Bench, and, as Sir William Buell Richards, of the Supreme Court of Canada, and Mr. Justice Hagarty, afterwards Chief Justice successively of the Court of Common Pleas, of the Court of King's Bench, and, as Sir John Hawkins Hagarty, of Ontario.

Mr. Freeman was assisted in this argument by Mr. M. C. Cameron, a

charged. No other attempts were made to extradite him or any other escaped slave and Lincoln's Emancipation Proclamation put an end to any chance of such an attempt being ever repeated.

W. R. RIDDELL.

lawyer of the highest standing professionally and otherwise, afterwards Justice of the Court of Queen's Bench, and afterwards, as Sir Matthew Cameron, Chief Justice of the Court of Common Pleas. Counsel for the crown on both arguments were Mr. Eccles, Q.C., a man of deservedly high reputation, and Robert Alexander Harrison, afterwards Chief Justice of the Court of Queen's Bench, an exceedingly learned and accurate lawyer.

The case in the Court of Common Pleas is reported in Vol. 11, Upper Can., C. P., pp. 1 sqq.

NOTES ON SLAVERY IN CANADA[1]

The following Notes received from the Canadian Archives Department, Ottawa, have more or less bearing upon the question of slavery in Upper Canada:

1. General James Murray, the first Governor of the new Government of Quebec, writing to John Watts, of New York, from Quebec, November 2, 1763, and speaking of the promoting of the improvement of agriculture, says:

"I must most earnestly entreat your assistance, without servants nothing can be done, had I the inclination to employ soldiers which is not the case, they would disappoint me, and Canadians will work for nobody but themselves. Black Slaves are certainly the only people to be depended upon, but it is necessary, I imagine they should be born in one or other of our Northern Colonies, the Winters here will not agree with a Native of the torrid zone, pray therefore if possible procure for me two Stout Young fellows, who have been accustomed to Country Business, and as I shall wish to see them happy, I am of opinion there is little felicity without a Communication with the Ladys, you may buy for each a clean young wife, who can wash and do the female offices about a farm, I shall begrudge no price, so hope we may, by your goodness succeed." (*Can. Arch.*, Murray Papers, Vol. II, p. 15.)

2. D. M. Erskine, writing from New York, May 26, 1807, to Francis Gore, Lt. Governor of Upper Canada, says:

"I have the honour to acknowledge the receipt of your letter of the 24th ult enclosing a Memorial presented to you by the Proprietors of Slaves in the Western District of the Province of Upper Canada.

"I regret equally with yourself the Inconvenience which His

[1] For these documents Mr. Justice Riddell is indebted to Mr. William Smith of the Department of Archives, Ottawa, Canada.

Majesty's subjects in Upper Canada experience from the Desertions of their slaves into the Territory of the United States, and of Persons bound to them for a term of years, as also of His Majesty's soldiers and sailors; but I fear no Representation to the Government of the United States will at the present avail in checking the evils complained of, as I have frequently of late had occasion to apply to them for the Surrender of various Deserters under different circumstances, and always without success—

"The answer that has been usually given, has been. 'That the Treaty between Great Britain & the United States which *alone* gave them the Power to surrender Deserters having expired, it was impossible for them to exercise such an authority without the Sanction of the Laws—'

"I will however forward to His Majesty's Minister for Foreign Affairs, the Memorial above mentioned in the Hope that some arrangements may be entered into to obviate in future the great Losses which are therein described." (*Can. Arch.*, Sundries, Upper Canada, 1807.)

3. John Beverley Robinson, Attorney General, Upper Canada, giving an opinion to the Lt. Governor, York, July 8, 1819, says the following:

"May it please Your Excellency

"In obedience to Your Excellency's commands I have perused the accompanying letter from C. C. Antrobus Esquire, His Majesty's Chargé d'affaires at the Court of Washington and have attentively considered the question referred to me by Your Excellency therein—namely—'Whether the owners of several Negro slaves from the United States of America and are now resident in this Province' and I beg to express most respectfully my opinion to Your Excellency that the Legislature of this Province having adopted the Law of England as the rule of decision in all questions relative to property and civil rights, and freedom of the person being the most important civil right protected by those laws, it follows that whatever may have been the condition of these Negroes in the Country to which they formerly belonged, here they are free —For the enjoyment of all civil rights consequent to a mere residence in the country and among them the right to personal freedom as acknowledged and protected by the Laws of England in

Cases similar to that under consideration, must notwithstanding any legislative enactment that may be thought to affect it, with which I am acquainted, be extended to these Negroes as well as to all others under His Majesty's Government in this Province—

"The consequence is that should any attempt be made by any person to infringe upon this right in the persons of these Negroes, they would most probably call for, and could compel the interference of those to whom the administration of our Laws is committed and I submit with the greatest deference to Your Excellency that it would not be in the power of the Executive Government in any manner to restrain or direct the Courts or Judges in the exercise of their duty upon such an application." (*Can. Arch.*, Sundries, Upper Canada, 1819.)

4. At a meeting of the Executive Council of the Province of Lower Canada held at the Council Chamber in the Castle of St. Lewis, on Thursday, June 18, 1829, under Sir James Kempt, the Administrator of the Government, the following proceedings were had:

"Report of a Committee of the whole Council Present The Honble. the Chief Justice in the Chair, Mr. Smith, Mr. DeLery, Mr. Stewart, and Mr. Cochran on Your Excellency's Reference of a Letter from the American Secretary of State requesting that Paul Vallard accused of having stolen a Mulatto Slave from the State of Illinois may be delivered up to the Government of the United States of America together with the Slave.

"May it please Your Excellency

"The Committee have proceeded to the consideration of the subject matter of this reference with every wish and disposition to aid the Officers of the Government of the United States of America in the execution of the Laws of that Dominion and they regret therefore the more that the present application cannot in their opinion be acceded to.

"In the former Cases the Committee have acted upon the Principle which now seems to be generally understood that whenever a Crime has been committed and the Perpetrator is punishable according to the Lex Loci of the Country in which it is committed, the country in which he is found may rightfully aid the Police of the Country against which the Crime was committed in bringing the

Criminal to Justice—and upon this ground have recommended that Fugitives from the United States should be delivered up.

"But the Committee conceive that the *Crimes* for which they are authorized to recommend the arrest of Individuals who have fled from other Countries must be such as are *mala in se*, and are universally admitted to be *Crimes* in every Nation, and that the offence of the *Individual* whose person is demanded must be such as to render him liable to arrest by the Law of Canada as well as by the Law of the United States.

"The state of slavery is not recognized by the Law of Canada nor does the Law admit that any Man can be the proprietor of another.

"Every Slave therefore who comes into the Province is immediately free whether he has been brought in by violence or has entered it of his own accord; and his liberty cannot from thenceforth be lawfully infringed without some Cause for which the Law of Canada has directed an arrest.

"On the other hand, the Individual from whom he has been taken cannot pretend that the Slave has been stolen from him in as much as the Law of Canada does not admit a Slave to be a subject of property.

"All of which is respectfully submitted to Your Excellency's Wisdom." (*Can. Arch.*, State K, p. 406.)

5. At a meeting of the Executive Council for Upper Canada, held at York, on Thursday, September 12, 1833, under Sir John Colborne, Lieutenant Governor, the following proceedings were had:

"Received a Letter from the Governor of the State of Michigan dated Detroit August 12th 1833 with a new requisition for the delivery up of Thornton Blackburn and other fugitives from Justice which was read in Council on 27th August 1833 with the following opinion of the Attorney General, as referred to him 13th July 1833.

"'ATTORNEY GENERAL'S OFFICE

"'12th July 1833

"'*Sir*

"'I have the Honour to return the various papers relating to the subject of the requisition from the acting Governor of Michigan

demanding that Thornton Blackburn and others who are stated to have fled from the justice of that country and taken refuge within this Province and now in custody at Sandwich should be given up, upon which His Excellency required my opinion whether the Law of this Province authorized him in complying with such demand or not. Had His Excellency been confined to the official requisition and the deposition that accompanied it he might I think have been warranted in delivering up those persons inasmuch as there is thereupon evidence on which according to the terms of our act (3 Wm 4th, C. 8) a magistrate would have been "warranted in apprehending and committing for trial" persons so charged who is convicted of the offence alleged viz: riot and forcible rescue and assault and battery would, if convicted, have been subject according to the Laws of this Province to one of the several punishments enumerated in the act as applicable to felonies and misdemeanors.

" 'That the Governor and Council are not confined to such evidence is clear since though limited in their authority to enforce the provisions of the act against fugitives from foreign States by the condition above mentioned viz: being satisfied that the evidence would warrant commitment for trial etc. yet in coming to that conclusion they are I think bound to hear no ex parte evidence alone but matter explanatory to guide their judgment; for even tho' satisfied with their authority so to do, they are not required "to deliver up any person so charged if for any reason they shall deem it inexpedient so to do.'

"In the present case I think the evidence on oath as to facts not alluded to in the official Communication and as to the law of the United States upon the subject becomes extremely important; I mean that of Mr Cleland and Mr Alexander Fraser the Attorney for the City of Detroit. The case appears to be this—Two coloured persons named Thornton a man and his wife were claimed as slaves on behalf of some person in the State of Kentucky; that they were arrested and examined before a magistrate in Detroit and he in accordance with the law of the United States made his certificate and directed them to be delivered over as the personal property of the claimant in Kentucky; that the Sheriff took them into custody in consequence and that when one of them, (the man) was on the point of being removed from prison in order to be restored to his owner he was with circumstances of considerable violence rescued and escaped to this Province. There appears to be an error in the

deposition accompanying the requisition, the wife of Thornton is there charged with being one of the persons assisting in the riot and rescue, whereas it appears that previous to the day of her husband's rescue she had eluded the Gaoler in disguise and she was then within this Province; she therefore does not appear to come within the class of offenders which the Act contemplates—viz: 'Malefactors who having committed crimes in foreign Countries have sought an asylum in this Province.'

"With regard to Thornton himself, the Attorney of Detroit who has favoured His Excellency with a certified Copy of the Law of the United States upon the subject, declares,—that the commitment to the custody of the Sheriff was illegal—and this is urged strongly as an equitable consideration against His Excellency's interference that the Sheriff detained Thornton in custody not as Sheriff but as agent for the Slave owner and that the law does not authorize *commitments* under such circumstances to the Sheriff, but merely that 'the owner, agent, or attorney may seize and arrest the fugitive (slave) and take him before the Judge etc: who upon proof that the person seized owes service to the claimant &c shall give a certificate thereof to such claimant, his agent or Attorney which shall be sufficient Warrant for removing the said fugitive from labour &c.'

"To this argument as to the illegality of the custody I do not attach much weight, for admitting that Thornton was not committed to the custody of Mr. Wilson as Sheriff of Wayne County, still as we may presume that the Judge's Certificate was properly given, he might not be the less legally in the custody of Mr Wilson *as agent to the claimant* in Kentucky; for the next section of the act of congress enacts that anyone who '*shall rescue such fugitive from such claimant or his agent &c shall forfeit and pay the sum of five hundred dollars &c.*' That the custody was legal according to the law of the United States I have little doubt; the legality there is officially recognized by the requisition and it is not a subject for His Excellency's enquiry. Upon this view of the case and considering that His Excellency in Council can only restore fugitives charged upon evidence of crimes which if proved to have been committed in this Province would subject the offender to 'Death, Corporal punishment by Pillory or whipping or by confinement at hard labour' and considering this as a Penal Act which must not be strained beyond the literal import towards those against whom it is intended to

operate; the result is that our law recognizes no such custody as that of an agent acting under a warrant for removing a fugitive slave to the Territory from which he fled, this is an offence which could not be committed within this Province in any case and therefore that His Excellency in Council is not by the Act of this Province either required or authorized to deliver up the persons demanded.

"I have the Honor to be, Sir, &c.,
"(Signed) ROBERT S. JAMESON, *Attorney General.*"

"The Council having again had before them the requisition of the Governor of the State of Michigan relative to the escape of certain offenders into this Province deem it mainly important to their full consideration of the question that besides his opinion upon the propriety of giving up the persons alluded to the Attorney General should be requested explicitly to state whether if a similar outrage had been committed in this Province the offender or offenders would be liable to undergo any of the punishments in the act passed last Session.

"(Signed) JOHN STRACHAN, P.C."
(*Can. Arch.*, State J, p. 137.)

6. At an Executive Council for Upper Canada held at York, Tuesday, September 17, 1833, under the presidency of the Rev. Dr. Strachan, the following proceedings were had:

"The Council assembled agreeably to the desire of His Excellency the Lieutenant Governor to take into consideration the requisition of his Excellency the Governor of Michigan.

"Read the following letter.

"'ATTORNEY GENERAL'S OFFICE
"' 14th September, 1833

"'*Sir*

"'To the question which the Executive Council have done me the honor to submit to me in relation to the requisition from the Governor of Michigan dated 12th August, 1833, whether if a similar outrage had been committed in this Province the offender would be liable to undergo any of the punishments stated in the Act (3 Wm 4, Cap 7) passed at the last Session I have the honor to answer

that a forcible rescue from the custody of the Sheriff of this Province attended with the aggravated circumstances detailed in the affidavit of John M. Wilson and Alexander McArthur accompanying the requisition would undoubtedly subject the offender and those actively aiding and abetting him to the gravest punishment in the act, death alone excepted.

"'I have the honor to be, Sir, &c.,
"'(Signed) ROBERT S JAMESON,
"'*Attorney General.*

"'To John Beikie, Esquire,
"'Clerk, Executive Council.'"

"The Council took the same into consideration and were pleased to make the following minute thereon.

"'The Council having had under consideration the requisition of His Excellency the Governor of Michigan together with the various papers relative thereto beg leave respectfully to state that as the question involves matters of great importance in our relations with a neighbouring state it would be satisfactory to them if the opinion of the Judges were obtained for their information.'" (*Can. Arch.*, State J. p. 148.)

7. At an Executive Council for Upper Canada held at York, September 27, 1833, under the presidency of Peter Robinson, the following proceedings were had:

"Resumed the consideration of His Excellency G. B. Porter, Esquire, Governor of Michigan's Letter of the 12th Ultimo which was read in Council on the 27th and again on the 12th and 17th Instant.

"Read also the Attorney General's opinion of the 20th Instant and the Judges' Report of this date as follows:

"'ATTORNEY GENERAL'S OFFICE
"'20th September, 1833

"'*Sir*

"'To the question which the Executive Council have done me the Honor to submit to me in relation to the requisition from the Governor of Michigan dated 12th August, 1833, whether if a similar outrage had been committed in this Province, the offender or offenders would be liable to undergo any of the punishments stated

in the Act (3 Wm. 4 c. 7) passed last Session: my opinion is that a forcible rescue from the custody of the sheriff in this Province attended with the aggravated circumstances detailed in the Affidavits of John M. Wilson and Alexander MacArthur though by the law of England it would subject the offender and those actively aiding and abetting him to severe corporal punishment, by the law of the Province as it now stands could not be visited by a graver punishment than fine and imprisonment which is not one of those enumerated in the act.

" 'I have the Honor to be, Sir, &c.,
" '(Signed) ROBERT S. JAMESON,
" '*Attorney General.*

" 'To
" 'John Beikie, Esq.,
" 'Clerk, Executive Council.'

" 'JUDGES' REPORT.
" 'York, 27th September, 1833.

" 'May it please Your Excellency

" 'We have the Honor to report to Your Excellency that we have deliberated upon the reference made to us by Your Excellency's Command on the 17th September Instant in respect to an application addressed to Your Excellency by the Government of the Territory of Michigan requesting that certain persons now inhabiting this Province may be apprehended and sent to that country to answer to a charge preferred against them for assaulting and beating the Sheriff of the County of Wayne and rescuing a prisoner from his custody. We observe that the recent act of the Legislature of this Province intituled "An Act to provide for the apprehending of fugitive offenders from foreign countries and delivering them up to Justice" (a copy of which we annex to this report) gives a discretion to the Governor and Council in carrying into effect its provisions declaring in express terms that it shall not be incumbent upon them to deliver up any person charged if for any reason they shall deem is inexpedient so to do." We take it for granted however notwithstanding the general terms in which the reference is made to us, that we are not expected to express our opinion upon what would or would not be a proper exercise of this discretion. It does not, indeed, occur to us than any question of political expediency is presented by the case and if any were, we should abstain from offering an opinion upon it.

" 'It is to the legal considerations connected with the case that we have confined ourselves; and in this view of it we beg respectfully to state that these prisoners having been once already apprehended and in custody in this Province upon this same charge and liberated by the decision of the Governor and Council after a consideration of the case upon an application made by the Government of Michigan, we should not think fit that the Governor and Council should authorize a second apprehension of the parties and exercise a second time the power and discretion given by the Act—This course we think could not be approved of unless, in the case of some atrocious offender, new and strong evidence should be discovered which it was not in the power of the foreign Government to produce upon a previous application and for the want of which the prisoners were upon such first application discharged, or perhaps in a case where some official or legal formality had by mere accident been overlooked on the first occasion.

" 'Independently of the consideration that this case has been already acted upon by the Government, the documents before us place it in this light: the prisoners with the exception of Blackburn and his wife are charged with assaulting and beating the sheriff of Wayne and rescuing a prisoner from his custody, Blackburn being the prisoner alluded to is charged with joining in the riot and battery of the Sheriff and with unlawfully rescuing himself—The wife of Blackburn we cannot find to be sufficiently charged with any offence known to our laws which do not acknowledge a state of slavery; for the imputation of conspiring with the rioters and contriving the rescue is supported by no evidence and seems to rest on conjecture—The prisoner Blackburn it appears from the Documents before us was not committed for felony nor for any crime nor imprisoned for any cause which by our laws could be recognized as a justification of imprisonment. We mention this not from any doubt that the prisoner was in legal custody according to the laws of Michigan but because the rescue of a prisoner constitutes by our law a greater or less offence according to the degree of the crime for which he was committed and this prisoner being committed for no crime and certainly not for any felony his rescue would according to our law be a misdemeanor only and a misdemeanor of that kind that the persons convicted of it would be punished by fine and imprisonment or either of them and not by any other description of punishment—The Statute referred to pro-

vides in explicit terms that the persons subject to be delivered up under it to the justice of a foreign country are those only who shall be charged "with murder, forgery, larceny or other crime committed without the jurisdiction of this Province which crimes if committed within this Province would *by the laws thereof* be punishable by *death corporal punishment* by *pillory* or *whipping* or by confinement at *hard labour.*" We are not aware whether the laws of the Territory of Michigan do or do not authorize the giving up of offenders charged with crimes not embraced in the above very comprehensive description; but however that may be, it is evident that the conduct of this and of other Governments in respect to the delivery up of offenders can be no further reciprocal towards each other than the laws of each will allow. We express no opinion except in reference to the statute recently passed here for regulating this particular matter—We consider the Legislature to have declared in that Statute their will in what cases fugitives from foreign countries should be surrendered; and we have therefore considered whether the persons in question as they are not charged with murder forgery or larceny could upon the facts before us be convicted of any other offence punishable at hard labour—We apprehend they could not be but that the offence of which they might be convicted would be punishable by fine and imprisonment merely without adding "hard labour" to the sentence. Riot, a Battery of the Sheriff in the execution of his duty, and the rescue of a person legally in his custody but not charged with felony or other crime are the offences with which upon the statements before us they are liable to be charged:—and all these are offences which in the known and ordinary administration of the law in this Province would be punished in no other manner than by fine and mere imprisonment. Instances we doubt not may be brought from distant times, in which one or other of the above offences has been punished in England by Pillory or whipping or by other unusual or disgraceful punishments and we do not say that these cases altho' they may be old are so decidedly void of all authority that a judgment which should now be passed in conformity to them would certainly be held to be erroneous and bad. But we conceive that in England such punishments have long ceased to be assigned to the offences in question; that in this Province they have never been assigned to them and that recent Statutes which have been passed in England tend strongly to show that Parliament did not regard them as punish-

ments which in later times could be properly attached to such offences without express Legislative sanction. We observe that there is evidence of one of the persons charged having pointed a loaded pistol at the Sheriff. If it had been further stated that he had pulled the trigger or otherwise attempted to discharge the pistol the act would have been one which in England is felony, having been first made so by Lord Ellenborough's Act passed in 1803; but that Act does not extend to this Province and was never adopted or in force here and if it were otherwise, still this case upon the facts stated is not within it. Looking upon the act of pointing or presenting the pistol as one for which all the rioters were equally responsible it forms an aggravation of their riot and assault but it does not change the legal character of their crime it would probably lead to a higher fine or a longer imprisonment but not to a punishment of another kind. The riot as it is described was an outrageous one and the battery of the sheriff appears to have been violent and cruel—the direct object and intent however seems to have been the rescue of the Prisoner rather than to take the life of the sheriff; and even supposing the facts would well support a conviction for an assault on the Sheriff with an intent *to murder him* still by our law such intent would be merely an aggravation of the riot and assault; it would not alter the technical character of the crime or the description of punishment however much it might enhance the fine or lead to increasing the term of Imprisonment.

" 'The conclusion therefore which we have come to is that these parties are not charged with any of the offences enumerated in the statute annexed and consequently that the Lieutenant Governor and council are not authorized by its provisions to send them out of the Province. It has not escaped our attention as a peculiar feature in this case that two of the persons whom the Government of this Province is requested to deliver up are persons recognized by the Government of Michigan as slaves and that it appears upon these documents that if they should be delivered up they would by the laws of the United States be exposed to be forced into a state of Slavery from which they had escaped two years ago when they fled from Kentucky to Detroit; that if they should be sent to Michigan and upon trial be convicted of the Riot and punished they would after undergoing their punishment be subject to be taken by their masters and continued in a state of Slavery for life, and that on the other hand if they should never be prosecuted or if they

should be tried and acquitted this consequence would equally follow. Among the Documents before us we perceive there are papers which have been delivered to the Government in behalf of the alleged rioters in which this inevitable consequence is urged as a reason against their being sent back to Michigan and in which it is intimated that to place the slaves again within the power of their masters is the principal object and that the Government of Michigan in making application for them is rather influenced by the interest and wishes of the slave owners than by any desire to bring the parties to trial for the alleged riot. No consideration of this kind has had any weight with us, for in the first place as regards the insinuation against the motives of the Government of Michigan if we had any thing to do with them we should consider (as no doubt this Government would consider in any similar case) that courtesy towards the Government of a foreign country requires always to assume that it has no motive or design on these occasions which is not just and fair and in short none but such as is openly avowed. And in the next place as to the consequence spoken of— If it would follow in course from the laws of the United States it is not probable that the Executive Government there would prevent the slave masters from asserting their rights under those laws and it is therefore reasonable to suppose that the consequence may really follow which the parties concerned have represented. Still if in this case the black people whose arrest is applied for had been shown to have fled from a charge for any such offence as would clearly come within our Statute, we do not conceive that we could on that account have advised a course to be pursued in regard to them different from that which should be pursued with respect to free white persons under the same circumstances. When we say this we should desire it to be understood that we are so clearly of opinion on the other hand, that the withdrawing from a state of Slavery in a foreign Country could not here be treated as an offence with reference to our statute already alluded to so that any person could be surrendered up under that statute upon such a ground merely. We beg leave to express to Your Excellency our regret for the delay that has occurred in answering the reference which Your Excellency and the Honorable the Executive Council have thought fit to make to us. Among other causes which have led to it was a doubt at first entertained among us whether we could properly give an opinion upon a matter which under possible cir-

cumstances might give rise to a judicial proceeding in which the same question would come before us or some one of us for decision. An examination of this subject has removed this doubt and we now submit our opinion to Your Excellency with such explanations as seemed to us to be material.

" 'We have the Honor to be
" 'Your Excellency's Most obedient
" and humble Servants
" '(Signed) " 'JOHN B. ROBINSON, C.J.
" 'L. P. SHERWOOD—J.
" 'J. B. MACAULAY—J.' "

"Upon which the council were pleased to make the following Report.

" '*To His Excellency,* Sir John Colborne, K.C.B., Lieutenant Governor of the Province of Upper Canada and Major General Commanding His Majesty's Forces therein—&c——&c &c

" 'May it please Your Excellency

" 'The Council have had under consideration the papers relating to the requisition of the acting Governor of Michigan, together with evidence furnished by His Excellency the Governor of that Territory accompanied by a further requisition for the delivery of the fugitives—they have also had before them the opinions of the three Judges and of the Attorney General with which they concur and have been led to the conclusion that the fugitive Slaves named in the requisitions are not charged with an offence which would have rendered them liable to any of the punishments enumerated in the Provincial Statute and consequently that the Lieutenant Governor and Council are not authorized by its provisions to send them out of the Province.' " (*Can. Arch.,* State J, p. 155.)

8. At an Executive Council for Upper Canada held at Toronto, Saturday, September 9, 1837, under the presidency of the Honourable William Allen, the following proceedings were had:

"Read the Attorney General's Report of the 8th instant on Documents for the surrender of Jesse Happy, a fugitive from Justice in the United States charged with horse stealing—upon which the Council made the following Report

" 'The Council have taken into serious consideration the Documents with the Reports of the Attorney General

" 'A similar application referred for the Report of the Council on the 7th Instant—In that case as in the present it was suggested that the fugitive was a slave, and that the real object of the application was not so much to bring him to trial for the alleged Felony as to reduce him again to a state of Slavery—In that case however it appeared that the Offence had been recently committed viz: in May last—That an early occasion, probably the first, was taken to have him indicted—that process for his apprehension immediately issued and that shortly after the return of the Sheriff to that process the requisition from His Excellency the Governor of the State of Kentucky was obtained and promptly brought to this Province. Under these circumstances the Council were of opinion that in the exercise of a sound discretion they were called upon to recommend to Your Excellency to comply with the requisition—The facts appearing upon the Official Documents in this case are widely different—The Alleged Offence purports to have been committed more than four years ago. When the Indictment was preferred is not shown (as it was in the former case) but the earliest date which shows its existence is 1st June 1835 when the certificate of the Clerk of the Court is given. No process seems to have been issued in the State of Kentucky nor is any other step shown to have been taken until the middle of last month. There also it is suggested that the fugitive is a slave that the real object of his apprehension is to give him up to his former owners and so to deprive him of that personal liberty which the laws of this country secure him. If this be conceded in the present instance after a lapse of four years, no argument could be consistently urged against the delivery up (on the uusal application) of persons who have been still longer resident in this Province.

" 'The delivery of a Slave under these circumstances to the authorities claiming him would it is clear subject him to a double penalty, the one of punishment for a crime, the other of a return to a state of Slavery, even if he should be acquitted. The former in strict accordance with our Statute, the other in direct opposition to the genius of our institutions and the spirit of our Laws. For this cause the Council feel great difficulty in the course which they would advise Your Excellency to adopt, were there any law by which, after taking his trial and if convicted undergoing his sen-

tence he would be restored to a state of freedom, the Council would not hesitate to advise his being given up but there is no such provision in the Statute.

"'On the other hand the Council feel that it cannot be permitted that because a man may happen to be a fugitive slave he should escape those consequences of crime committed in a foreign country to which a free man would be amenable. This would be equally contrary to the Law and to the spirit of mutual justice which gave origin to it, in this Province as well as in the United States. Considering however the circumstances of this case and also the difficulty that might arise from it as a precedent the Council respectfully recommend that time should be given to the accused to furnish affidavits of the facts set forth in the Petition presented on his behalf in order to a full understanding of the whole matter.

"'The Council would further respectfully submit to Your Excellency the propriety of drawing the attention of Her Majesty's Government to this question with a view of ascertaining their views upon it as a matter of general policy.'" (*Can. Arch.*, State J, p. 597.)